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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 364

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, APPELLANT,

vs.

THE CITY OF SEATTLE AND HARRY W. CARROLL, AS COMPTROLLER OF THE CITY OF SEATTLE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

STATEMENT AS TO JURISDICTION.

The appellant, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, respectfully represents:

A.

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is Judicial

Code, § 237 (*a*) (28 U. S. Code § 344), reading, to the extent relevent here, as follows:

> "SECTION 237. (*a*) A final judgment or decree in any suit in the highest court of a State in which a decision could be had * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. * * *"

The remedy by writ of error, under the foregoing section, has been abolished and an appeal substituted.

Act of January 31, 1928, as amended by the Act of April 26, 1928; 45 Stat. 54; 45 Stat. 466 (28 U. S. Code, § § 861 *a*, 861 *b*);

Nashville, etc., Ry. v. *White*, 278 U. S. 456, 460;

Great Northern Ry. Co. v. *Minnesota*, 278 U. S. 503, 506;

Larson v. *South Dakota*, 278 U. S. 429, 432.

B.

The Statute or Ordinance of the State the Validity of Which is Involved.

The validity of a licensing ordinance of the City of Seattle, Washington, a municipal corporation existing under and by virtue of the laws of the State of Washington is involved. The ordinance is No. 62662. The pertinent provisions thereof are:

"ORDINANCE No. 62662.

An ordinance relating to, and providing for, a license or occupation tax upon certain businesses, occupations, pursuits and privileges; defining offenses and providing penalties.

Be it ordanied by the City of Seattle as follows:

SECTION 1. *Exercise of Revenue License Power.*—The provisions of this ordinance shall be deemed an exercise of the powers of the City of Seattle to license for revenue.

SECTION 2. *Definitions.*—In construing the provisions of this ordinance, save wl .1 otherwise plainly declared or clearly apparent from the context, the following definitions shall be applied:

Gross Income.—The value proceeding or accruing from the sale of tangible property or service, and receipts, (including all sums earned or charged, whether received or not) by reason of the investment of capital in the business engaged in, including rentals, royalties, fees or other emoluments, however designated (excluding receipts or proceeds from the use or sale of real property or any interest therein, and proceeds from the sale of notes, bonds, mortgages, or other evidences of indebtedness, or stocks and the like) and without any deduction on account of the cost of the property sold, the cost of materials used, labor costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses.

* * * * * * *

SECTION 3. *'Occupation License' Required.*—After the 1st day of July, 1932, no person shall engage in or carry any business. occupation, pursuit or privilege for which a license fee or tax is imposed on this ordinance without having first obtained, and being the holder of, a valid and subsisting license so to do, to be known as an 'Occupation License.'

Any person engaging in, or carrying on, more than on such business, occupation, pursuit or privilege shall pay the license tax so imposed upon each of the same.

Any taxpayer who engages in, or carries on, any business subject to tax hereunder without having his 'Occupation License' so to do, shall be guilty of a violation of this ordinance for each day during which the

business is so engaged in or carried on, and any taxpayer who fails or refuses to pay the license fee or tax or any part thereof on or before the due date shall be deemed to be operating without having his license so to do.

SECTION 5. *Occupations Subject to Tax—Amount.*—There are hereby levied and shall be collected annual license fees or occupation taxes against the persons on account of the business activities, and in the amounts to be determined by the application of the rates against gross income, as follows:

(*a*) Upon every person engaged in or carrying on a telegraph and/or telephone business, a fee or tax equal to four per cent. (4%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than One Thousand ($1,000.00) Dollars per tax year.

* * * * * * *

SECTION 15. *Taxpayer to Keep Books and Records—Returns Confidential.*—It shall be the duty of each taxpayer taxed upon his gross income to keep and enter in a proper book or set of books or records an account which shall accurately reflect the amount of his gross income, which account shall always be open to the inspection of the City Comptroller, or his duly authorized agent, and from which said officer or his agent may verify the return made by the taxpayer.

The applications, statements or returns made to the City Comptroller, pursuant to this ordinance, shall not be made public, nor shall they be subject to the inspection of any person except the Mayor, the Corporation Counsel, the City Comptroller, or his authorized agent, and members of the City Council.

SECTION 16. *Comptroller to Investigate Returns.*—If any taxpayer fails to apply for license or make his

return, or if the City Comptroller is dissatisfied as to the correctness of the statements made in the application or return of any taxpayer, said officer, or his authorized agent, may enter the premises of such taxpayer at any reasonable time for the purpose of inspecting his books or records of account to ascertain the amount of the fee or tax or to determine the correctness of such statements, as the case may be, and may examine any person under oath administered by said officer, or his agent, touching the matters inquired into, or said officer, or his authorized agent, may fix a time and place for an investigation of the correctness of the return and may issue a subpoena to the taxpayer, or any other person, to attend upon such investigation and there testify, under oath administered by said officer, or his agent, in regard to the matters inquired into and may, by subpoena, require him, or any person, to bring with him such books, records and papers as may be necessary.

* * * * * * *

SECTION 24. *Penalty.*—Any person violating or failing to comply with any of the provisions of this ordinance or any lawful rule or regulation adopted by the City Comptroller pursuant thereto, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine in any sum not to exceed Three Hundred ($300.00) Dollars, or by imprisonment in the City Jail for a term not exceeding ninety (90) days, or by both such fine and imprisonment."

C

The date of the final judgment of the Supreme Court of the State of Washington sought to be reviewed is June 14, 1933.

The judgment of the Supreme Court of the State of Washington, which was a judgment affirming a dismissal of the

action, is a "final judgment" within the meaning of Judicial Code 237.

Missouri & Kansas Interurban Ry. Co. v. *Olathe*, 222 U. S. 185.

The time for taking the appeal began to run on the date of such final judgment, to-wit, June 14, 1933. (See *Puget Sound Power & Light Co.* v. *King County*, 264 U. S. 22, where the time for appealing from the judgments of the Supreme Court of the State of Washington is considered.)

The date on which the application for appeal was presented and the appeal allowed is June 19, 1933.

D.

The Nature of the Case and the Rulings Below.

The nature of the case and the rulings below which are deemed to bring the case within the jurisdictional provision relied on are as follows:

The appellant, The Pacific Telephone and Telegraph Company, commenced this suit in the Superior Court of the State of Washington for King County to enjoin the appellees from collecting of the appellant the license fees upon gross income prescribed by Ordinance No. 62662 of the City of Seattle, Washington, and to restrain any attempt by the said City to enforce the ordinance and its penalties against the appellant.

The appellant filed its amended complaint in the above entitled cause, alleging the following material facts:

That appellant is a corporation duly organized under and by virtue of the laws of the State of California, duly licensed to do business in the State of Washington (Paragraph I).

That appellant owns and operates a public telephone and telegraph system in the State of Washington and in the

States of California, Oregon and a part of Idaho, furnishing to the public telephone exchange service and both intrastate and interstate telephone toll service and telegraph service (Paragraph II).

That the City of Seattle is a municipal corporation organized under the laws of the State of Washington, and that the appellee Harry W. Carroll is the duly elected, qualified and acting comptroller of the City of Seattle (Paragraph III).

That on May 23, 1932, the city council of the City of Seattle passed Ordinance No. 62662, entitled:

> "An ordinance relating to, and providing for, a license or occupation tax upon certain businesses, occupations, pursuits and privileges; defining offenses and providing penalties."

which said ordinance was on May 25, 1932, approved by the acting mayor of said city. That a copy of said ordinance is attached to the said amended complaint and made a part thereof (Paragraph IV):

That the State of Washington, under tariffs approved by the Department of Public Works of the State of Washington, is divided into a number of telephone exchange areas. Telephone exchange service is service between telephone stations within the same exchange area, and telephone toll service is telephone service between telephone stations located in different exchange areas. Among said exchange areas in the State of Washington is the "Seattle Exchange," but which last mentioned exchange area includes several thousand telephone stations outside the limits of the City of Seattle. Said telephone exchange service and intrastate telephone toll service together constitute the major portion of appellant's telephone service within the State of Washington. Telegraph service is both intrastate and interstate,

and intrastate telegraph service is service between points within the State of Washington (Paragraph V).

That by authorization of the Department of Public Works of Washington given prior to 1931, and in pursuance of its statutory powers, the Seattle Exchange, as established and at all times since maintained, embraces an area including the City of Seattle and the territory immediately adjacent thereto (Paragraph VI).

That the Interstate Commerce Commission, in pursuance of its statutory powers, has prescribed the form of accounts to be kept by telephone companies, subject to the Act to Regulate Commerce, as amended (41 Stat. L. 474), and in particular in accordance with Section 20 of said Act as amended; that appellant is one of the telephone companies in the United States subject to said Act and is required by law to keep its accounts in the form prescribed by the Interstate Commerce Commission; that the Department of Public Works of the State of Washington, by order No. 5251, dated October 31, 1921, has adopted and has prescribed for all telephone companies subject to its jurisdiction the same form of accounts as that adopted and prescribed by the Interstate Commerce Commission (Paragraph VII).

That in order for appellant to furnish its customers receiving exchange service in the Seattle Exchange with telephone exchange service, as hereinbefore defined, it is necessary for appellant to provide equipment known as "Central Office Equipment"; that the term "Central Office Equipment" is defined both by the Interstate Commerce Commission and by the regulatory body of the State of Washington as follows:

> *"Central Office Telephone Equipment.*
>
> This account should include the cost of local and toll switchboards, chief operators', monitors', and supervisors' desks and tables, wire chiefs' testing outfits,

main and intermediate frames, cables, and jumper wires, call registers or meters, relay racks and coil racks, and power plants, including rectifiers, generators, engines, motors, batteries, power switchboards, meters, and fuse boards; telephone and telegraph instruments, and other electrical instruments and apparatus in the central office devoted to the operation of the telephone plant'' (Paragraph VIII).

That without the use of central office equipment, it is impossible for appellant to render any telephone exchange service at all; that the investment by said appellant in central office equipment located wholly inside the city limits of Seattle is in excess of $10,000,000; that in order to render economical and efficient telephone exchange service to its customers receiving exchange service in the Seattle Exchange, it is necessary for appellant to run its wires or cables to some point, same being the wire center point within various districts within the Seattle Exchange, and which wires and cables are connected to the central office equipment owned and operated by appellant in the Seattle Exchange; that said districts are known as central office districts and are eleven in number; that in order for appellant's customers receiving exchange service in any one of said districts to communicate by telephone with its customers receiving exchange service within any one of said other ten central office districts, it is necessary for appellant to connect, by means of conduits and cables, the central office equipment installed in any one of said districts with the central office equipment installed in the remaining ten districts; that the central office equipment installed in each of said central office districts, the aggregate investment by appellant in which said central office equipment exceeds, as aforesaid, the sum of $10,000,000, is necessarily housed in eleven buildings located at the central wire point in said

central office districts and called central office buildings; that said buildings and the land on which said buildings are located are (with the exception of the Glendale central office) owned by said appellant, and all of said buildings, including the Glendale central office building, are situated wholly inside the city limits of Seattle, and the investment of said appellant in the land and buildings owned as aforesaid now exceeds, and did exceed in 1931, the sum of $3,000,000 (Paragraph IX).

That appellant's said customers receiving exchange service within the Seattle Exchange, but receiving such service outside the city limits of Seattle, are furnished exchange service by the use of the central office equipment installed as aforesaid in the aforesaid central office buildings; that said central office equipment is necessarily connected with the telephone equipment consisting of telephone stations, drop wires, protectors, coin boxes, etc., installed in the places of business or residences of said customers receiving service in the Seattle Exchange but outside the city limits thereof; that the connection between said central office equipment installed as aforesaid in said central office buildings and the telephone equipment installed on the premsies of appellant's customers receiving exchange service outside the city limits of Seattle, but within the Seattle Exchange, is necessarily made by means of wires strung on poles, or cables strung on poles, or laid in conduits; that said poles, conduits, wires and cables are located partly inside and partly outside the city limits of Seattle (Paragraph X).

That said lands and buildings owned and situated as aforesaid are used and of necessity used in the rendition of appellant's telephone exchange service in said Seattle Exchange; that it is impossible for appellant to determine or estimate the proportion of the moneys received by it in Seattle in 1931 from its customers receiving exchange serv-

ice in the Seattle Exchange, whether such customers receive such service inside or outside the city limits of Seattle, due to the use and necessary use by said appellant of said lands and the buildings thereon in the rendition of said exchange service (Paragraph XI).

That said appellant was engaged in 1931 not only in rendering telephone exchange service but also telephone toll service; that telephone toll service is divided into two classes, intrastate toll service and interstate toll service; that intrastate toll service is telephone service between telephone stations located in different exchange areas, all of which areas are located within the State of Washington; and interstate toll service is telephone service between telephone stations located in different exchange areas within the State of Washington and telephone stations located in different exchange areas outside the State of Washington. That in order for appellant's customers receiving intrastate toll service inside the city limits of Seattle to communicate with appellant's customers receiving intrastate toll service in areas outside the Seattle Exchange, it was necessary in 1931 and still is necessary for appellant to connect its telephone plant located inside the city limits of Seattle, including said central office equipment housed as aforesaid in said central office buildings, with appellant's telephone plants located in exchange areas outside the Seattle Exchange; that in order for appellant's customers receiving telephone service outside the city limits of Seattle, but within the Seattle Exchange area, to communicate with appellant's customers receiving intrastate toll service furnished by appellant in exchange areas other than the Seattle Exchange, it was necessary, in 1931 and still is, for appellant to connect not only the telephone plant of appellant located inside the city limits of Seattle, in which said appellant has invested capital of many millions of dollars,

but also the telephone plant of appellant, including, among other items of property, poles, wires, cables, conduits, telephone stations, drop wires, protectors, coin boxes, etc. (but no central office equipment or land or buildings), located outside the city limits of Seattle but within the Seattle Exchange, with the telephone plant of appellant located in exchange areas outside the Seattle Exchange area; that said appellant had, in the year 1931, a capital investment in plant, land and buildings, all of which were located outside the Seattle Exchange but within the State of Washington, and used and necessarily used in the operation of its intrastate telephone toll service, in excess of $20,000,000, and which said plant, land and buildings were necessary to the rendition by appellant of intrastate telephone toll service to its customers receiving service within the Seattle Exchange (Paragraph XII).

That it is impossible for appellant to determine or estimate the proportion of the money received by it in 1931 from its customers in the Seattle Exchange receiving intrastate toll service, whether such customers receive such service inside or outside the city limits of Seattle, due to the use and necessary use by said appellant of (*a*) the lands and the buildings thereon owned and situated inside the city limits of Seattle and (*b*) the lands and the buildings thereon situated in other exchange areas within the State of Washington, in the rendition of said intrastate toll service (Paragraph XIII).

That appellant is engaged in rendering intrastate and interstate telegraph service; that it had, long prior to 1931, duly filed with the Postmaster General of the United States its written acceptance of the restrictions and obligations required by the Act of Congress of July 24, 1866 (14 Stat. L. 221); that appellant's customers residing in the City of Seattle in 1931, desiring to transmit messages by telegraph

to persons residing at points other than Seattle in the State of Washington, tendered to appellant, either in person or by telephone, such messages at the aforesaid central office buildings of appellant located inside the city limits of Seattle; that said messages were accepted by and transmitted telegraphically by appellant; that some of appellant's customers residing outside the City of Seattle but within the area of the Seattle Exchange tendered, in 1931, by telephone to appellant, messages to be transmitted telegraphically by appellant to points in the State of Washington other than Seattle, which said messages were accepted by and transmitted telegraphically by appellant; that all of said messages, tendered as aforesaid and accepted as aforesaid in the year 1931, were transmitted from the central office buildings of said appellant located in the City of Seattle by the use of central office equipment housed in said central office buildings and by the use of poles, wires, cables and conduits extending between said central office buildings located in the City of Seattle to central office buildings owned by appellant located in points other than Seattle in the State of Washington and by the use of central office equipment housed in said buildings located as aforesaid in points other than Seattle in the State of Washington (Paragraph XIV).

That it is impossible for appellant to determine or estimate the proportion of the money received by it in 1931 from its customers employing its intrastate telegraph service, whether such customers employing such service resided inside the city limits of Seattle or outside the city limits of Seattle but within the area of the Seattle Exchange, due to the use and necessary use by said appellant of (*a*) the lands and the buildings thereon owned and situated inside the city limits of Seattle and (*b*) the lands and the buildings thereon situated in points other than Seattle in the State of Wash-

ington, which said last mentioned land and buildings were in 1931 and are now owned by appellant (Paragraph XV).

That appellant's telephone and telegraph business in the City of Seattle is conducted efficiently and economically; that appellant's net earnings derived from its telephone and telegraph business in the Seattle Exchange during the first three months of 1932, stated in rate per cent annual return upon the cost of appellant's property, used and useful in furnishing said service in said exchange and exclusively devoted to the rendition thereof, was not in excess of 3.25 per cent; that appellant's net earnings derived from its telephone and telegraph business in the City of Seattle, stated in rate per cent annual return upon the cost of the property located in the City of Seattle and used and useful in furnishing telephone and telegraph service and exclusively devoted to the rendition thereof, during the first three months of 1932, was somewhat less than 3.25 per cent; that the net earnings of appellant on said property, together with any additions made thereto during the months of April, May, June, July, August and September, 1932, are now declining, and, based upon past and present experience, will continue to decline throughout the year 1932 (Paragraph XVI).

That the appellees have at all times since the effective date of said ordinance threatened and still threaten to enforce the same and the penalties thereof against the appellant (Paragraph XVII).

That the appellant has paid all taxes of any and every kind levied either by or for the State of Washington, the County of King, a municipal corporation of the State of Washington, or the City of Seattle, against all of its property of any and every kind for the tax years prior to 1931; that on March 15, 1932, the appellant paid to the treasurer

of King County the sum of $96,908.41, being the total 1931 tax, less 3 per cent rebate, on the real property owned by the appellant in the City of Seattle, and of this amount $44,164.01 was the tax levied for the City of Seattle against the said real property owned by this appellant in the City of Seattle, the remainder of said amount being the tax levied for the State of Washington, for the County of King, a municipal corporation of the State of Washington in which the City of Seattle is located, for Seattle School District No. 1, and for the Port of Seattle, a municipal corporation of the State of Washington; that on March 15, 1932, the appellant paid to the treasurer of King County $302,590.97, being the first half of the 1931 tax levied against all of the appellant's personal property located in King County, Washington, $126,664.52 of said amount being the amount of taxes levied for the City of Seattle against the personal property of the appellant located inside the city limits of Seattle, the remainder of said amount being the amount of taxes levied for the State of Washington, for the County of King, for Seattle School District No. 1 and various other school districts in said County of King, for the Port of Seattle, a municipal corporation of the State of Washington, and for various towns and road districts in said county located outside the city limits of Seattle; that the remaining one-half of said personal property tax for the year 1931 can be paid without penalty on or before November 30, 1932 (Paragraph XVIII).

That said Ordinance No. 62662 is invalid, *inter alia,* upon the following grounds:

1. That said ordinance conflicts with the due process clause of the Fourteenth Amendment to the Constitution of the United States, in that said ordinance is so vague and indefinite in its definition of gross income as to render it

impossible for appellant to compute, with reasonable certainty, the amount of the tax, if any, owing by it thereunder, and subjects appellant to criminal penalties for noncompliance with the said vague and indefinite terms of said ordinance.

2. That said ordinance conflicts with the due process clause of the Fourteenth Amendment to the Constitution of the United States, in that the said ordinance fixes no method of computation whereby appellant, with reasonable certainty, can segregate its interstate business from its business conducted wholly within the City of Seattle, nor any method whereby appellant can, with reasonable certainty, segregate its business conducted wholly within the City of Seattle from its intrastate business conducted between the said City of Seattle and points outside said city.

3. That the said ordinance conflicts with the due process clause of the Fourteenth Amendment to the Constitution of the United States, in that appellant is not now and for more than twenty-one months last past has not been earning a fair return upon its property within the City of Seattle used and useful in the public service, and that said license fee, or any portion thereof, required by said ordinance is arbitrary, unreasonable, oppressive, and confiscatory of appellant's property.

4. That the said ordinance violates the due process clause of the Fourteenth Amendment to the Constitution of the United States, in that said ordinance undertakes completely to prohibit the doing of an entirely lawful business except upon payment of a license fee with respect to a business that the said City has no power to regulate.

5. That the said ordinance conflicts with the equal protection clause of the Fourteenth Amendment to the Consti-

tution of the United States, in that the license fees fixed by said ordinance are arbitrary and discriminatory because different rates are fixed by said ordinance on businesses (public utilities) in the same general class.

6. That the said ordinance conflicts with the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, in that the license tax imposed upon gross income thereunder, being a direct property tax, constitutes an additional property tax on the property of the appellant and is levied on an unequal and discriminatory basis upon the public utilities included in and affected by said ordinance (Paragraph XIX).

That the General Fund of the appellee City of Seattle is now heavily overdrawn, and that the banks in the said city have since May, 1932, refused to cash or accept any and all warrants on said fund, and that warrants on said fund cannot be cashed, and that, even if said license tax were computable by appellant with reasonable certainty, and appellant paid the same, the time of re-payment thereof to appellant by said city is wholly conjectural and uncertain (Paragraph XX).

That appellant has no adequate remedy at law, and that unless equitable relief by injunction, temporary and permanent, is granted by this court, appellant will be deprived of its rights as hereinbefore alleged; that the loss resulting from the enforcement of said ordinance is irreparable, and that the penalties provided by said ordinance are so severe and will lead to such a multiplicity of suits and prosecutions that appellant has no adequate remedy except in a court of equity (Paragraph XXI).

The appellees demurred to the appellant's amended complaint upon the ground that the said complaint did not state facts sufficient to constitute a cause of action, which

demurrer was by the said Superior Court sustained on the 18th day of October, 1932.

The appellant elected to stand upon its amended complaint and declined to plead further; and thereupon the said Superior Court on the said 18th day of October, 1932, entered its judgment and decree dismissing the action.

Thereafter an appeal was prosecuted by appellant from said judgment of dismissal to the Supreme Court of the State of Washington, and upon the said appeal of the said judgment and decree of dismissal of the Superior Court of the State of Washington for King County was affirmed by the Supreme Court of the State of Washington, in an opinion filed on the 21st day of April, 1933.

Thereafter, within the thirty days allowed by the statutes of the State of Washington, the appellant applied for a rehearing of said cause, which was denied by the Supreme Court of the State of Washington on the 14th day of June, 1933, and the final judgment of the Supreme Court of the State of Washington was entered on the 14th day of June, 1933.

E.

Cases Believed to Sustain the Jurisdiction.

The following cases are believed to sustain the jurisdiction of this court:

King Manufacturing Co. v. *City Council of Augusta,* 277 U. S. 100;

Sultan Ry. Co. v. *Dept. of Labor,* 277 U. S. 135;

Bryant v. *Zimmermann,* 278 U. S. 63, 67;

Connally v. *General Construction Co.,* 269 U. S. 385, 391;

Champlin Refining Co. v. *Commission,* 286 U. S. 210, 243.

We respectfully submit that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Section 237 (*a*) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C., Title 28, Section 344).

Respectfully submitted,

MAURICE MCMICKEN,
H. J. RAMSEY,
OTTO B. RUPP,
ALFRED J. SCHWEPPE,
Attorneys for Appellant.

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